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No. 75-420

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE APPELLANTS

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1. Chessie has contended throughout this litigation that it has no "deferred maintenance" and no "delayed capital improvements" (*e.g.*, App. 8–11, 18–19, 36–39). Chessie repeats that contention in its brief (*e.g.*, Br. 2, 7–8, 12–15, 27–31), and a substantial portion of its argument is devoted to demonstrating that this "fact" establishes the illegality of the Commission's action.

Chessie's assertions that it cannot use the revenues it has collected under the Commission's authority in *Ex Parte 305* go not to the existence of the Commission's power to impose conditions but to the wisdom

of the exercise of that power. For purposes of passing upon the extent of the Commission's authority, the Court must assume that Chessie, like other railroads, can expend the funds for the purposes the Commission has prescribed.[1] If the Court sustains the Commission's authority to impose conditions upon the nonsuspension of a revenue increase, it should return this case to the district court so that it can pass upon Chessie's argument that its inability to use the *Ex Parte 305* revenues makes the Commission's action arbitrary and capricious with respect to it.

2. Chessie contends (Br. 20) that the Commission is "seeking new legislation" that would give it the power it has exercised here; Chessie argues that Congress' decision not to enact the proposed legislation demonstrates that the Commission has exceeded its authority. The proposed legislation to which Chessie refers, however, has nothing to do with the present

[1] For the reasons discussed at J.S. 16–17, n. 15, we submit that Chessie's argument that it has no "deferred maintenance" or "delayed capital improvements" is entirely without support. We filed in the district court an affidavit by a Commission auditor describing some of the maintenance needs of Chessie (App. 65–75). Moreover, Chessie could have sought the Commission's permission to apply *Ex Parte 305* funds to its current maintenance program (see J.S. App. 104a, 107a–108a), but it has declined to do so.

Because the district court granted judgment in favor of Chessie without remanding to the Commission to make a finding upon, and without itself resolving, the disputed factual issues, it necessarily viewed all of them (to the extent they are material) in the light most favorable to the Commission. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655. Thus, in the present posture of the case, it must be assumed that Chessie can spend the *Ex Parte 305* revenues for permissible purposes.

case. Because the Commission believed that many railroads (of which the Penn Central was the most visible example) were diverting essential railroad revenues to nontransportation investments, it asked Congress to give it the authority to control such diversions. See Interstate Commerce Commission, *85th Annual Report* 90–91 (1971). Authority to control nontransportation investments would be quite different from the power to require railroads to devote increased revenues, collected with the Commission's permission, to the purpose that made their collection just and reasonable. The Commission's lack of the former power implies nothing about the latter authority.[2]

3. Our brief discussed (Br. 17–18; 36–37, n. 27) the Railroad Revitalization and Reform Act of 1975, which was then awaiting transmission to the President. The President signed the bill and it became law on February 5, 1976. Pub. L. 94–210, 90 Stat. 31.

For these reasons, in addition to the reasons set out in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed and the case remanded for further proceedings.

ROBERT H. BORK,
Solicitor General.

ARTHUR J. CERRA,
General Counsel,
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[2] The Commission has informed us that it never has requested Congress to provide it explicitly with the authority that, we have argued, already is implicit in the Interstate Commerce Act.

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